SUPREME COURT, U.S.
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No. 03-855

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged reservation land is Indian country pursuant to 18 U.S.C. § 1151 and this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*") where the land was neither set aside by the federal government nor superintended by the federal government?

2. Whether alleged reservation land was set aside by the federal government for purposes of Indian country analysis under 18 U.S.C. § 1151 and *Venetie* where the 1788 Treaty of Fort Schuyler terminated all aboriginal title and the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment?

3. Whether the 1838 Treaty of Buffalo Creek, which required the Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation?

4. Whether alleged reservation land may (i) remain Indian country or (ii) remain subject to the protections of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Indian Trade and Intercourse Act protection ceases to exist?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were petitioner City of Sherrill, New York and respondents Oneida Indian Nation of New York, Ray Halbritter, Keller George, Chuck Fougnier, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Beulah Green, Brian Patterson and Iva Rodgers. Respondent Ruth Burr was a party in the district court and Second Circuit, but a suggestion of death of Ruth Burr was filed in the Second Circuit on May 10, 2002. Madison County, Oneida County and the State of New York appeared as *amici curiae* in the district court, Second Circuit and in connection with the petition to this Court.

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BRIEF FOR PETITIONER

The City of Sherrill ("Sherrill" or "Petitioner") respectfully requests that the judgment of the Second Circuit, affirming judgments of summary judgment for the Oneida Indian Nation in the district court, be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 337 F.3d 139. PA 1-60.[1] The order denying the Petition for Rehearing or Rehearing *en banc* is unreported. PA 134-35. The memorandum decision and order of the district court is published at 145 F. Supp.2d 226. PA 61-133.

JURISDICTION

The judgment of the Court of Appeals was issued on July 21, 2003. The Petition for Rehearing or Rehearing *en banc* was denied on September 15, 2003. A Petition for a Writ of Certiorari was filed on December 11, 2003, and this Court granted a writ of certiorari on June 28, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

TREATY, CONSTITUTIONAL AND STATUTORY PROVISIONS

The following treaty, constitutional and statutory provisions are involved in the case: The 1788 Treaty of Fort Schuyler, September 22, 1788; the 1794 Treaty of Canandaigua, November 11, 1794, 7 Stat. 44; the 1838 Treaty of Buffalo Creek, January 15, 1838, 7 Stat. 550; the

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[1] Citations to "PA __" are to the Appendix to the Petition for a Writ of Certiorari filed in this matter.

Tenth Amendment to the United States Constitution; 18 U.S.C. § 1151; 25 U.S.C § 177; 25 U.S.C. § 233; and 25 U.S.C. § 465. Their text (other than the Tenth Amendment) appears in the appendices to the Petition for a Writ of Certiorari at pages PA 136 through PA 184.[2]

STATEMENT OF THE CASE

The Parties

Petitioner City of Sherrill is a municipal corporation organized under the laws of the State of New York. It is New York's smallest city, occupying one and one-half square miles, with a population of approximately 3,000. Its total annual budget is approximately $2.4 million. CA 201-37, 722-57, 798-801.[3]

Respondent Oneida Indian Nation of New York ("Oneida Indian Nation") is presently a federally recognized Indian tribe governed by a Nation Representative and a Tribal Council. Respondent Ray Halbritter is the Nation Representative, chief executive officer of the Oneida Nation enterprises, and one of the members of the Council. The other Respondents are members of the Council.

The Relevant History of the Oneida Indians

1. The Treaties of Fort Schuyler and Canandaigua

Prior to and during the Revolutionary War, the colonists respected the Oneidas' right to possession of their aboriginal lands, which totaled approximately six million acres in central New York. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d 226, 233-34 (N.D.N.Y. 2001). In 1788, in the Treaty of Fort Schuyler with the State of New York, the Oneidas sold all of their land to the State of New York. PA 136. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "First, The Oneidas do cede and grant all their lands to the people of the State of New York forever." Then, in the second paragraph of the Treaty, the State of New York expressly created a 300,000-acre reservation for use by the Oneidas. *Id.* at 136-38 That treaty and sale terminated aboriginal title to the land.

Two years later, in 1790, Congress passed the first Indian Trade and Intercourse Act, currently found at 25 U.S.C. § 177, which required the federal government to approve all sales or transfers of land from any Indian nation or Indian tribe. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d at 234. As they had prior to the passage of the Indian Trade and Intercourse Act, the Oneidas continued to sell large portions of the land that New York State had set aside for their use.

In November 1794, the United States entered into the 1794 Treaty of Canandaigua, 7 Stat. 44, with the Six Nations of the Iroquois – the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora tribes. PA 141-46. With respect to the Oneidas, article 2 of the 1794 Treaty of Canandaigua **acknowledges** the reservation established by the State of New York:

> The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never

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[2] The Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[3] Citations to "CA ___" are to the joint appendix in the Second Circuit Court of Appeals. Citations to "JA ___" are to the Joint Appendix in this Court.

> claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase. (PA 141; emphasis added).

On the other hand, as to the Senecas, the specific metes and bounds of the reservation set aside by the federal government are described in detail, and no prior State reservation is mentioned. (PA 142).

In 1795, the Oneidas sold a substantial portion of what remained of their 300,000-acre reservation created by the State of New York. *Oneida Indian Nation*, 145 F. Supp.2d at 234. Since 1795, title to most of these 300,000 acres has passed through voluntary, free-market transactions. *Id.* The transactions that conveyed the properties in Sherrill at issue in this case (the "Properties") occurred in 1805, when the Properties were conveyed by a group of Oneida Indians to Cornelius Dockstader, an Oneida Indian. In 1807, Dockstader conveyed them to Peter Smith, a non-Indian. *Id.* at 243; CA 407-15.

2. Indian Removal and the Treaty of Buffalo Creek

Beginning in the early nineteenth century, the federal government's policy toward the Indians changed from respect for the Indians' possession of their ancestral lands to removal of the eastern Indians to lands in the western United States. Between 1820 and 1822, and in keeping with the federal government's new policy, some New York Indians, including some Oneidas, relocated to land the federal government purchased for them in the state of Wisconsin. *Oneida Indian Nation*, 145 F. Supp.2d at 234-35. Other

Oneidas relocated to Ontario, Canada. *Id.* at 235. Thus, the Oneidas split into three groups: Oneidas in New York, Oneidas in Wisconsin and Oneidas in Canada (also known as the Thames Oneidas). *Id.* The Oneida Indian Nation of New York claims to be a successor to those Oneidas who remained in New York.

The federal government codified its removal policy in the Indian Removal Act, 4 Stat. 411 passed by Congress in 1830, which authorized the federal government to give land west of the Mississippi River to Indians in exchange for their eastern land. *Id.* "The core purpose of the federal removal policy was to mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

One result of the federal policy of removal was the 1838 Treaty of Buffalo Creek, 7 Stat. 550, an obligatory removal treaty in which the New York Indians, including those Oneidas who had not yet removed from New York, agreed to abandon lands east of the Mississippi and remove to Kansas. PA 147-78. In Article 2 of the treaty, the United States designated a 1,824,000-acre reservation in what is now the State of Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States . . ." PA 149-50. In Article 13, all Oneidas living in New York agreed to remove to their new home in Kansas. PA 155.[4]

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[4] At the time of the 1838 Treaty of Buffalo Creek, there were 620 Oneidas in New York and 600 in Wisconsin. Most of the remaining Oneidas left New York in the next few years. *The Oneida Indian Experience: Two Perspectives*, 61 (J. Campisi and L. Hauptman eds. 1988).

The Treaty of Buffalo Creek is explicit about its background and purpose. Its preamble recounted over 20 years of federal efforts to remove the New York Indians, including the Oneidas, from New York. Preamble, 7 Stat. at 550-51. PA 147-48. The express purpose of the treaty was to carry out the "policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory." Preamble, 7 Stat. at 551. PA 148. Thus, the Treaty of Buffalo Creek was intended "to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites," *New York Indians v. United States*, 40 Ct. Cl. 448, 450 (1905). The Treaty of Buffalo Creek was thus intended to end the very types of jurisdictional conflicts at issue here.

The legislative history of the treaty also indicates that it implemented then-existing federal removal policy:

> A territory west of the Mississippi has been procured, and sacredly set apart by this Government, amply sufficient for the location of all the remnant tribes of Indians which may be found remaining in all the States and Territories of this Union. It is the settled policy and wish of this Government thus to locate these Indians.

Speech of Senator Lumpkin of Georgia, *Appendix to the Congressional Globe*, 26th Cong., 1st Sess., 285, 286 (March 19, 1840).

The Treaty of Buffalo Creek expressly provided for the removal of the Oneidas from New York: the Oneidas and the other New York Indians ceded to the United States lands previously granted them in Wisconsin (except for a tract that became the present Oneida reservation in Wisconsin) and received a new 1,824,000-acre reservation in modern-day

Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes . . ." Arts. 1, 2, 7 Stat. at 551-552. PA 148-50. The new reservation was to be the "future home" for, among others, the 620 "Oneidas . . . [then] residing in the State of New York." Art. 2, Sch. A, 7 Stat. at 551-552, 556. PA 149-50, 160-61.[5]

The Treaty of Buffalo Creek provided that the Oneidas could henceforth "establish their own form of government, appoint their own officers, and administer their own laws" on the Kansas lands designated as "their new homes." Art. 4, 7 Stat. at 552. PA 150-51. The treaty's terms restricted the Oneida's exercise of these powers of tribal sovereignty and jurisdiction to "said country," *i.e.*, the part of the new reservation specifically delineated for occupation by the Oneidas. Arts. 4, 5, 7 Stat. at 552. PA 150-51. Finally, the treaty provided for the disposition of the Oneidas' remaining lands in New York. The Oneidas "hereby agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements

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5 The court below incorrectly held that the Oneidas in New York were not intended to share in the Kansas lands because they "had a permanent residence in New York State." *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 162 n.17 (2d Cir. 2003). The Treaty of Buffalo Creek set apart an amount of land in Kansas more than sufficient to provide 320 acres to each of the New York Indians enumerated in the census set forth in Schedule A to the treaty, including the 620 New York Oneidas. *See* Sch. A, 7 Stat. at 556; *New York Indians v. United States*, 40 Ct. Cl. 448, 458 (1905). The treaty specifically provided that the Kansas lands were "intended as a future home" for the Oneidas residing in the State of New York. 7 Stat. at 551-52. Moreover, as discussed below, the fact that the Kansas lands were intended to be the new home of, among others, the Oneidas still living in New York was shown by the fact that their descendants shared in the recovery in *New York Indians v. United States*, 170 U.S. 1 (1898).

with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. at 554. PA 155.

Although most of the Oneidas remaining in New York did not move to Kansas to live on the reservation designated for their benefit in the Treaty of Buffalo Creek, they and other New York Indian tribes sued the United States for the value of the Kansas lands after the federal government sold the Kansas lands to homesteaders. *New York Indians v. United S.ates*, 170 U.S. 1 (1898). Their lawsuit was successful, and the Oneidas living in New York, Wisconsin and Canada shared in the nearly $2 million recovery. *Id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the Oneidas sought and received the benefit of the Kansas reservation established in exchange for their New York lands in the 1838 Treaty of Buffalo Creek.

3. The Lapse In Oneida Tribal Existence

There is substantial evidence that, following the 1838 Treaty of Buffalo Creek, the Oneidas ceased to exist as a tribe in New York for nearly a century. For example, in 1877, a district court noted that "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).

Similarly in 1891, the federal government explained that "The Oneida Indians have no reservation.... [The few

Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* (CA 1228-31.) That same observation was oft repeated over the following decades. *See 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*; *1900 Annual Report of the Department of the Interior*; *1901 Annual Report of the Department of the Interior*; *1906 Annual Report of the Department of the Interior*. That point is also made in the 1892 Census Map of New York, which depicts no Oneida reservation. CA 900-95, 1221-56.

That situation persisted into the mid-twentieth century. For example, the record below established that in 1925, an Assistant Commissioner of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). CA 1180-83. Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

The Action Below

In 1997 and 1998, the Oneida Indian Nation used the proceeds from its Turning Stone casino in Verona, New York to purchase several businesses and properties in Madison and Oneida Counties, New York in open-market transactions with private parties. Included in these purchases were the Properties in Sherrill upon which the Oneida Indian Nation

operates a gas station (with an attached convenience store) and a textile manufacturing and distribution facility.

Contending that the Properties were located within its historical reservation, the Oneida Indian Nation refused to pay property taxes assessed by Sherrill on the land and structures, or to collect sales tax on sales of merchandise sold at their businesses. Sherrill sent the Oneida Indian Nation notices of tax delinquency for the Properties and thereafter conducted a tax sale, purchased the Properties and initiated eviction proceedings in New York State Supreme Court (the "Eviction Case").

The Oneida Indian Nation then sued Sherrill in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the Properties were situated on land that was part of its historic reservation, which they claim was established by the 1794 Treaty of Canandaigua and, therefore, exempt from state and local taxation (the "Lead Case"). The Oneida Indian Nation also removed the Eviction Case to federal court, and contended that Sherrill's claims were barred by sovereign immunity. In response, Sherrill commenced an action against the individual members of the Oneida Tribal Council (the "Members Case"). The Eviction, Lead and Members Cases were subsequently consolidated and adjudicated in district court.

In a June 4, 2001 memorandum-decision and order, the district court: (1) denied Sherrill's motion in the Lead Case for summary judgment or, alternatively, a preliminary injunction enjoining the Oneida Indian Nation from purchasing additional properties in Sherrill; (2) granted the Oneida Indian Nation's cross motion for summary judgment in the Lead Case and granted Oneida Indian Nation's motion for summary judgment in the Eviction Case; (3) granted summary judgment dismissing Sherrill's counterclaims

against the Oneida Indian Nation in the Lead Case; (4) granted defendants' motion to dismiss the Members Case; and (5) denied Sherrill's motion for leave to amend its answer in the Lead Case. *Oneida Indian Nation*, 145 F. Supp.2d at 266-67.[6]

The City of Sherrill appealed and, to the extent pertinent here, the Second Circuit affirmed (in a 2-1 decision), with Senior Circuit Judge Van Graafeiland dissenting. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Court of Appeals found that the Properties were Indian country because the reservation had been established, not by New York State in the 1788 Treaty of Fort Schuyler, but rather by the federal government in the 1794 Treaty of Canandaigua, 7 Stat. 44. The Second Circuit rejected any notion that the 1838 Treaty of Buffalo Creek, 7 Stat 550, required the New York Oneidas to abandon their lands in New York State and move to Kansas. Finally, the Second Circuit held that tribal continuity is not required for a tribe to maintain reservation status and Indian Trade and Intercourse Act protection – that is, a reservation and Indian Trade and Intercourse Act protection continues even if a tribe ceases to exist. 337 F.3d at 155-68. The City of Sherrill petitioned for rehearing or rehearing *en banc*; that petition was denied on September 15, 2003.

Prior Oneida Litigation In This Court

This case is one of many lawsuits the Oneida Indian Nation has filed in an attempt to undo the 1788 Treaty of Fort Schuyler, 1838 Treaty of Buffalo Creek and the land transactions its ancestors entered into with New York State beginning over two hundred years ago. Indeed, these disputes have twice before been to this Court:

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6 That same day, the district court also entered three separate final judgments disposing of all parties' claims.

Oneida Indian Nation of New York State v. County of Oneida, New York, 414 U.S. 661 (1974) ("*Oneida I*") – In 1970, the Oneida Indian Nation of New York and the Wisconsin and Thames Oneidas brought suit against Oneida and Madison Counties (the "Counties") in the Northern District of New York to recover the fair rental value of certain land possessed by the Counties for the period January 1, 1968 through December 31, 1969. *Id.* at 664-65. The Oneidas claimed that the land at issue was part of the approximately 125,000 acres sold by the Oneidas to New York State in 1795, allegedly in violation of the Indian Trade and Intercourse Act. *Id.* This Court held that the Oneidas' complaint stated a controversy arising under the Constitution, laws, or treaties of the United States, and therefore that the district court erred in dismissing it for lack of federal question jurisdiction. *Id.* at 666.

County of Oneida, New York v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) ("*Oneida II*") – This Court in *Oneida I* remanded the case to the district court for trial. On remand, after a trial in which the Counties presented no evidence, the district court held, *inter alia*, that the Counties were liable for wrongful possession of the lands conveyed to New York State in 1795 because that conveyance violated the Indian Trade and Intercourse Act. *Id.* at 232-33. The Court awarded damages for the fair rental value of the land for the two-year period specified in the complaint. *Id.* at 230. The district court's decision was appealed. This Court held that the Oneidas could maintain an action for violation of their possessory rights based on federal common law. This Court also held that the Oneidas had a cause of action under federal common law (*id.* at 236) and that the action was not barred by the defenses of statute of limitations, abatement, ratification or nonjusticiability. *Id.* at 240-50. This Court declined to rule on whether laches barred the Oneidas' claim. *Id.* at 244-45.

This Court in *Oneida II* was not presented with and did not address the effect of the 1788 Treaty of Fort Schuyler or the 1838 Treaty of Buffalo Creek. Indeed, the Treaty of Fort Schuyler is not cited at all and the only place the 1838 Treaty of Buffalo Creek is mentioned in *Oneida II* is in the dissenting opinion, where Justice Stevens observed that "[t]here is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek, which ceded most of the Tribe's lands in Wisconsin to the United States in exchange for a new reservation in [Kansas]." 470 U.S. at 269 n.24.

SUMMARY OF ARGUMENT

1. The Second Circuit's decision that the Properties are Indian country is in direct conflict with this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) and the 1788 Treaty of Fort Schuyler. In *Venetie*, this Court held that for property to be Indian country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside by the State of New York and superintended by the State of New York and local governments.

In the 1788 Treaty of Fort Schuyler, prior to the effective date of the United States Constitution, the New York Oneidas ceded all of their territory to the State of New York. That cession terminated all aboriginal title. The State of New York then set aside approximately 300,000 acres for the Oneidas' future use. In 1794, the federal government, in the Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create a reservation for the Oneidas.

The governing treaties and this Court's controlling case law compel the conclusion that the Properties are not Indian country under 18 U.S.C. § 1151. Although § 1151 has three prongs – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government.

The land at issue was neither set aside nor superintended by the federal government. Rather, the land was set aside for the use of the Oneidas by the State of New York in the 1788 Treaty of Fort Schuyler. Moreover, as in *Venetie*, the Oneidas own the Properties in Sherrill in fee simple and are free to use them for any purpose, including any non-Indian purpose.

Nor are the Properties federally superintended. For two centuries, State and local governments have provided all services with respect to the land at issue. The level of federal superintendence over Indian land required for Indian country status is that the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Venetie*, 522 U.S. at 533. In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation. The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the

Properties are provided by Sherrill and not by the federal government. As a result, the land at issue is not Indian country pursuant to 18 U.S.C. § 1151, and may be taxed by the City of Sherrill.

Moreover, the Properties are freely alienable, even if they once were part of the Oneida reservation. That is so for because the Properties are not subject to the protections of the Indian Trade and Intercourse Act, 25 U.S.C. §177. In such circumstances, reservation status is only available by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998).

Thus, the Properties are not Indian country.

2. The 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the Oneidas to abandon all lands in the State of New York and remove to Kansas, thus terminating any remaining Oneida reservation in New York.

In Article 1 of the Treaty, the Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. As this Court has recognized, the agreement by the Oneidas and others to abandon all eastern lands was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Thus, Congress intended, and the Oneidas agreed, to remove permanently from New York and Wisconsin and move to Kansas.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished the Oneidas' New York reservation was put to rest by this Court when Indian tribes including the Oneidas successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them.

This Court held in *New York Indians v. United States*, 170 U.S. 1, 19 (1898), that the Treaty was an effective grant of lands and descendants of the Oneidas from New York shared in the nearly $2 million recovery. *New York Indians v. United States*, 170 U.S. 1 (1898); *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). The Oneidas from New York shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from and disestablish their New York and other eastern homes.

Thus, the 1838 Treaty of Buffalo Creek terminated any Oneida reservation in New York.

3. There was substantial evidence below that the Oneidas ceased to exist as a tribe in New York for decades in the late nineteenth and early twentieth centuries. If tribal status ceased, Indian country status and the protections of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, ceased, and the only way that the New York Oneidas could recover reservation status was by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Thus, at the very least, summary judgment for the Oneida Indian Nation was improper.

ARGUMENT

I. UNDER THIS COURT'S DECISION IN *VENETIE* AND THE 1788 TREATY OF FORT SCHUYLER, THE PROPERTIES ARE NOT INDIAN COUNTRY

The Second Circuit's decision below must be reversed because it ignores the 1788 Treaty of Fort Schuyler and this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), that for property to be Indian country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside by the State of New York and superintended by the State of New York and local governments; and the 1788 Treaty of Fort Schuyler terminated all aboriginal title.

The controlling legal issue here is whether the Properties are Indian country pursuant to 18 U.S.C. § 1151. The "Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 882 (9th Cir. 1999) (quoting *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987)); *see Venetie*, 522 U.S. at 527 ("Although [18 U.S.C. § 1151's definition of Indian country] by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction").

This Court has explained that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n v. Citizen Band*

Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991). Reservation status for Indian country purposes is a term of art.

Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

In *Venetie*, this Court explained that, in enacting § 1151 in 1948, Congress codified the two requirements that the Court had previously held necessary for a finding of Indian country (federal set aside and federal superintendence). *Venetie*, 522 U.S. at 527. Although § 1151 has three prongs[7] – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government.

In the words of the this Court,

> [In our prior cases] . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

Id. at 530 (citations omitted).

Contrary to the decision below, the fact that land is labeled "reservation" land or is subject to the restrictions of the Indian Trade and Intercourse Act is not the test. Whatever the word "reservation" means in other contexts, reservation status for Indian country purposes requires federal set-aside and federal superintendence. As this Court observed as long ago as 1914 in *United States v. Pelican*, 232 U.S. 442, 449 (1914)(emphasis added), in describing the Colville reservation at issue prior to the creation of allotments, "the original reservation was Indian country

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[7] The Oneida Indian Nation makes no claim that its Sherrill Properties constitute a dependent Indian community or an allotment. *Oneida Indian Nation*, 145 F. Supp.2d at 244. Thus, only the "reservations" prong of § 1151 is at issue in this case.

Moreover, the Oneida Indian Nation concedes that, if the Properties are not Indian country, then the Properties are not exempt from taxation. Thus, although – as we demonstrate below – the Properties are not subject to the Indian Trade and Intercourse Act, 25 U.S.C. § 177, Indian Trade and Intercourse Act coverage is not dispositive on the question of Indian country. Indeed, the Second Circuit has held that the Indian Trade and Intercourse Act has broader reach than Indian country. *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government."

This Court made the same point in *Potawatomi*, 498 U.S. at 511 ("the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government'") (citations omitted) and other courts – unlike the Second Circuit below – have followed that lead. *Malabed v. North Slope Borough*, 42 F. Supp.2d 927, 933 (D. Alaska 1999)(citing Felix S. Cohen, *Handbook of Federal Indian Law*, 37 (1982 ed.) ("A reservation is, in effect, simply a more formal or officially recognized variant of a dependent Indian community. . . . [T]hat is, all reservations are lands set aside for the use of Indians under federal superintendence"); *see also Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 115 (1960)(lands owned by the Tuscarora Indian Nation are not within a reservation, as defined in the Federal Power Act, because they are "owned in fee simple" and "no 'interest' in them 'is owned by the United States'").

Neither federal set aside nor superintendence is present here. As a result, this Court should reverse the decision below and direct the entry of judgment for Petitioner.

A. The Properties Were Set Aside By The State of New York

1. The 1788 Treaty of Fort Schuyler Terminated Aboriginal Title and Set Aside A State Reservation

The Second Circuit ignored the express language of

the 1788 Treaty of Fort Schuyler in concluding that the Properties were set aside by the federal government for use of the Oneidas. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "The Oneidas do cede and grant all their lands to the people of the State of New York forever."[8] Of this grant, New York reserved a 300,000-acre tract for the Oneidas' "specified uses." PA 136-38. Thus, it cannot be questioned that the State of New York, and not the federal government, set aside for use by the Oneidas the land upon which the Properties are situated. As a result, the Treaty of Fort Schuyler unambiguously extinguished the Oneidas' aboriginal title in the first article, and created a State in the second.

Early authorities confirm that the Oneidas ceded all their land to New York, receiving in return a limited grant of property from New York. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent), described the treaty as follows:

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this State, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding twenty-one years.

Goodell v. Jackson, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Similarly, in 1831, Chief Justice Marshall noted that "some tribes" made pre-Constitution treaties with New York State "by which they ceded all their

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8 Occurring prior to the effective date of the United States Constitution, this sale was entirely lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

lands to that state, taking back a limited grant to themselves, in which they admit their dependence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added).[9]

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed consistent with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. In reviewing a claim on behalf of the Cayuga Indians in Canada against the United States for annuities, the panel found that the Cayugas' title had been extinguished and the lands ceded to New York: "We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession." Fred K. Nielsen, *American and British Claims Arbitration*, 326-27 (citing *Cherokee Nation*) (Government Printing Office 1926).

Thus, the 1788 Treaty of Fort Schuyler terminated aboriginal title to all Oneida land in New York and set aside a State reservation for the Oneidas.

2. The 1794 Treat of Canandaigua Merely Acknowledged The Existing State Reservation, And Did Not Create A Federal Reservation

The Second Circuit ignored the 1788 Treaty of Fort Schuyler and found that the Oneida reservation was set aside by the 1794 Treaty of Canandaigua. 337 F.3d at 155-56. That is incorrect. Rather, the 1794 Treaty of Canandaigua merely – and expressly – "acknowledged" the land reserved by New York State for the Oneidas.

Thus, in the 1794 Treaty of Canandaigua, Article 2

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9 Although Chief Justice Marshall does not specifically identify the Oneidas, he accurately described the 1788 Treaty of Fort Schuyler, as well as similar treaties with the Onondaga and Cayuga tribes.

provides, in pertinent part, that

> The United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof . . .

That is to be contrasted with Article 3 of the treaty, which expressly establishes a reservation for the Senecas. PA 141-42.

Accordingly, the 1794 Treaty of Canandaigua was nothing more than an acknowledgment by the federal government of the Oneida reservation previously created by New York State in the 1788 Treaty of Fort Schuyler. It did not create a federal reservation.

That is confirmed not only by the express language of the Treaty of Canandaigua, but also by the historical context in which the treaty was negotiated. The purpose of the 1794 Treaty of Canandaigua was the resolution of a dispute with the Senecas; and the Senecas were the principal intended beneficiary of the Treaty of Canandaigua, not the other tribes of the Six Nations, including the Oneidas. *Seneca Nation of Indians v. New York*, 206 F. Supp.2d 448, 487 (W.D.N.Y. 2002). In 1782, New York ceded to the United States its claim to western lands (present-day Ohio), in exchange for a boundary fixed by the federal government. *Id.* at 473. Thereafter, in the 1784 Treaty of Fort Stanwix, October 22, 1784, 7 Stat. 15, the Six Nations released their claims to these western lands, in which, among the Six Nations, only the Senecas had an interest. *Id.* at 478-80. The 1784 Treaty

of Fort Stanwix caused discontent among the Senecas, who felt they had been required to relinquish too much land and were affected by inadvertent geographical errors in setting boundaries. *Id.* at 480-86. By 1794, this discontent caused the Senecas (and possibly other Iroquois tribes) to consider joining the active warfare between the western Indians and the United States. *Id.* at 486. To avoid that escalation of hostilities, the United States renewed treaty negotiations at Canandaigua. *Id.* at 486-87.

Thus, the purposes of the 1794 Treaty of Canandaigua were (1) to reconfirm peace between the United States and the Six Nations, particularly the Senecas, (2) to correct the inadvertent geographical error in boundaries, and (3) to relinquish any rights the United States acquired through that inadvertent error. *Id.* at 487. There was no federal purpose to take property from the State of New York or establish a federal reservation for the Oneidas.

At bottom, the 1794 Treaty of Canandaigua did not set aside an Oneida reservation. Rather, that land was set aside by the State of New York in the 1788 Treaty of Fort Schuyler. As a result, the land on which the Properties are situated was not set aside by the federal government for use by the Oneidas. Therefore, under *Venetie*, the Properties are not Indian country.

B. The Properties Were Never Under Federal Superintendence

The Properties are not now and never were under federal superintendence, which is an independent reason why they are not Indian country. *Venetie*, 522 U.S. at 533. The Second Circuit essentially rejected that aspect of *Venetie*, and held that there was no requirement of proof that "reservation" land is federally superintended to be Indian country. That error cannot stand.

The level of federal superintendence over Indian land required for Indian country status is that the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Id.* In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation.[10] The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the Properties are provided by Sherrill and not by the federal government. Moreover, the Properties are not part of the 32 acres of land in Madison County recognized by the Bureau of Indian Affairs as under the jurisdiction of the federal government. In such circumstances, the federal government does not superintend the Properties. *United States v. Roberts*, 185 F.3d 1125, 1130-31 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (land was under federal superintendence only because the United States retained title to the property; the state considered the property to be beyond its taxing jurisdiction; the BIA Area Director approved the land acquisition; the government oversaw the property; and the BIA treated the property as trust land); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1253 (10th Cir. 2000)(land was under federal

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10 Indeed, the legislative history to 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) indicates that the federal Indian Bureau believed, at the time this act was passed, that the Indians of New York "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949).

superintendence because the BIA treated the land in the same manner as lands within the tribe's formal reservation).

The Second Circuit's conclusion that the Properties are Indian country simply because they are within the historical Oneida Indian reservation is incorrect. The court reached that conclusion by finding that the federal set aside and superintendence requirements are inapplicable where the land in question is a formal reservation. 337 F.3d at 155 ("While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision."). That holding incorrectly (i) presumes the existence of federal set aside; (ii) ignores *Venetie*; (iii) eviscerates the requirements of proof of federal set aside and superintendence for all three prongs of 18 U.S.C. § 1151; and (iv) is based upon the incorrect finding that the federal government established the reservation for the Oneidas in New York State through the 1794 Treaty of Canandaigua. That is a distortion of this Court's precedents and governing treaties.

C. The Sherrill Properties Are Freely Alienable And Are Not Indian Country Absent Federal Regulatory Approval

There is yet another independent reason why the Properties are not Indian country: the Properties were freely alienable prior to their purchase by the Oneidas, and remain so today. As such, they cannot be vested with Indian country status absent regulatory approval by the federal government. That result flows from Supreme Court precedent and the Indian regulatory scheme.

1. The Properties Are Freely Alienable

The Properties are freely alienable, even if they once were part of the Oneida reservation. The owners of land in the historical Oneida reservation have held fee simple title for most of the last 200 years. The Oneida Indian Nation obtained the Properties in Sherrill in private transactions from non-Indian landowners. The Oneida Indian Nation owns the Properties in Sherrill in fee simple and is free to use them for any purpose, including any non-Indian purpose, also free from any federal government restrictions. That is so because the Properties are not subject to the protections of the Indian Trade and Intercourse Act, 25 U.S.C. § 177.

The 1794 Treaty of Canandaigua expressly permitted the Oneidas and other tribes to sell, and the expressly granted the people of the United States to purchase, the lands referenced in the Treaty: "[S]aid reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." (PA 141; emphasis added). Thus, as a result of both the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua, the sale of the Properties to non-Oneidas was not a violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177.

Moreover, the Second Circuit erred by concluding that the Indian Trade and Intercourse Act applied to the Properties because of the Oneidas' "unextinguished" aboriginal title. 337 F.3d at 146-47, 157-58. As explained above, aboriginal title in Properties terminated – was extinguished – in 1788 as a result of the Treaty of Fort Schuyler. Subsequent sales by the Oneidas of portions of their State-created reservation – in which aboriginal title no longer existed – were not prohibited by the Indian Trade and Intercourse Act. *See Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described

it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer"); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829) (the provisions of the Indian Trade and Intercourse Act of 1802 are expressly confined to lands lying within the defined boundary of Indian country).

The Court of Appeals found that New York State did not hold any interest in the reservation established under the 1788 Treaty of Fort Schuyler because, "[a]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution." 337 F.3d at 146. That finding violates the concept of State sovereignty preserved by the Tenth Amendment to the Constitution of the United States to the extent it applies to lands as to which aboriginal title had been extinguished prior to the effectiveness of the federal Constitution.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court explained that "[a]lthough the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* at 713 (*quoting Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71, n.15 (1996)); *accord Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). An important component of State sovereignty is that "a State has plenary powers 'over its own territory. . .'" *Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) (*citing Railroad Co. v. Maryland*, 88 U.S. 456, 473 (1874)); *accord Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 591 (1886).

In 1788, New York State was the sovereign vested with the right of preemption. In the 1788 Treaty of Fort

Schuyler, New York State exercised that right to extinguish aboriginal title and the Oneidas ceded all property rights to the land at issue to the State of New York. These rights were preserved – and not divested – by the federal Constitution. The Constitution did not deprive the State of New York of jurisdiction over its own territory.

As a result, the Properties owned by the Oneida Indian Nation are freely alienable.

2. Indian Country Status Can Only Be Reclaimed By Federal Regulatory Action

As demonstrated above, the Oneida Indian Nation owns the Properties in fee simple and is free to use them for any purpose, including any non-Indian purpose, also free from any federal government restrictions. That land is not Indian country. *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999)("The [Navajo land in question] is not [Indian country] because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government"); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993) (United Keetoowah Band of Cherokee Indians' ("UKB") businesses were not located on land set aside by the federal government for purposes of 18 U.S.C. § 1151(b) because title was held by UKB in fee simple and "[n]o action ha[d] been taken by the federal government indicating that it set aside the land for use by the UKB").

The only way that such land can become Indian country, and therefore exempt from taxation, is for the Oneida Indian Nation to petition the Secretary of the Interior

to restore the land to federal trust protection under the Indian Reorganization Act. 25 U.S.C. § 465. This mandatory procedure flows directly from this Court's decision in *Cass County*.

This Court held in *Cass County* that purchase of freely alienable land by an Indian tribe does not make that land Indian country or exempt from state or local taxation. Rather, the "repurchase of [freely alienable] land by an Indian Tribe does not cause the land to resume tax-exempt status . . . unless and until [it is] restored to federal trust protection under § 465." 524 U.S. at 115 (emphasis added).

The decision below ignores the procedural safeguards put in place by the federal government to prevent and minimize the hardships to individuals, cities, counties and states. Under the Indian Reorganization Act, in order for land to be taken into trust by the government, and thus be exempt from taxation, the tribe must file a petition with the Secretary of the Interior (the "Secretary"). 25 U.S.C. § 465.

When filing a petition under § 465, the applicant must provide for the Secretary's consideration, *inter alia*, "[a] description of the effect on the State and its political subdivisions of removing the land from tax rolls," and "[a] description of any jurisdictional and land use infrastructure issues that might arise." 25 C.F.R. § 151.12. Local city, county and state governments are afforded an opportunity to respond to such petitions. Before accepting the land in trust, the federal government is required to weigh the impact of the acquisition on the "State and its political subdivisions resulting from the removal of the land from the tax rolls," as well as the impact of other "jurisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10. Moreover, an application may be approved only if necessary to "[f]acilitate tribal self-determination, economic development, Indian housing, land consolidation or natural

resource protection; and [the Secretary] determine[s] that the acquisition provides meaningful benefits to the Tribe that outweigh any demonstrable harm to the local community." 25 C.F.R. § 151.14. Even if conferring trust status results in benefits to the tribe that outweigh harm to local governments, the Secretary may disapprove an application if it would result in "[s]ignificant harm to the local community." *Id.* These procedures allow Oneida Indian Nation to seek to recreate or reclaim a tribal homeland, while balancing hardships to municipalities and residents in central New York.

For all of the foregoing reasons, the Properties are not Indian country.

II. THE 1838 TREATY OF BUFFALO CREEK DISESTABLISHED ANY ONEIDA RESERVATION IN NEW YORK

The 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the Oneidas to abandon any lands in the State of New York. The Treaty of Buffalo Creek, subsequent case law, the removal policy of the United States government at the time the treaty was signed and other circumstances all demonstrate that the Oneidas' New York reservation was disestablished as a matter of law.

A. The Treaty of Buffalo Creek and *New York Indians* Make Plain That No Oneida Reservation In New York Existed After The Treaty

In Article 1 of the Treaty of Buffalo Creek, the Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor

of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. PA 149-50, 155. Congress intended, and the Oneidas agreed, to remove from New York and Wisconsin and move to Kansas permanently.

Equally clear is the fact that the Kansas lands were in exchange for the Oneidas' removal from the eastern lands, including lands in New York. Nowhere in the jurisprudence or commentary is it even suggested that the 1838 Treaty of Buffalo Creek was intended to create a Kansas reservation for the Oneidas in addition to a 300,000-acre parcel – or any parcel – in New York. Such a result would turn then-existing federal Indian policy on its head.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished any Oneida reservation in New York was put to rest by this Court when, in the late nineteenth century, Indian tribes including the Oneidas from New York successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them. *New York Indians v. United States*, 170 U.S. 1 (1898). Holding that the Indians were entitled to the value of the Kansas land, this Court stated:

> While it might be reasonably contended that [the Indians'] failure to remove should result in a cancellation of the [Treaty of Buffalo Creek], and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain.

Id. at 19.

Significantly, although the language of this Court's decision was limited to the Wisconsin reservation, the judgment was not so limited. The Oneidas from New York, Wisconsin and Canada all shared in a nearly $2 million recovery flowing from the sale of the Kansas lands. *See id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases"). The Oneidas from New York shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from their New York and other eastern homes. The Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, *albeit* not the benefit they initially bargained for. The Court of Appeals, however, permitted the Oneidas to have their cake and eat it too: to undo the bargain, while retaining the benefit, *i.e.*, the proceeds of the civil judgment.

In *Oneida II*, four Justices of this Court, citing *New York Indians* and *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 357-58 (1941), observed – with respect to an issue not resolved by the Court – that whether the Oneidas abandoned their claim to lands in New York when they signed the Treaty of Buffalo Creek was a "serious question." *Oneida II*, 470 U.S. at 269 n.24 (1985) (Stevens, J. dissenting). It is now time to resolve that serious question and hold that the Treaty of Buffalo Creek terminated any Oneida reservation in New York.[11]

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[11] Although two district court decisions have held that the Treaty of Buffalo Creek did not retroactively ratify prior land purchases by the State and extinguish causes of action for violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, these cases did not address the issue of

B. The Second Circuit Distorted The 1838 Treaty of Buffalo Creek in Numerous Respects

The Second Circuit distorted the 1838 Treaty of Buffalo Creek in numerous respects:

1. The Second Circuit's misinterpretation of the Treaty of Buffalo Creek is grounded in its mistaken belief that the "central bargain" of the treaty was the Indians' exchange of their Wisconsin lands for new lands west of the Mississippi. *Sherrill*, 337 F.3d at 160, 164 (the Wisconsin land exchange was the "rationale for the award" to the New York Oneidas and others in *New York Indians)*. That ignores the language of the Treaty and the *New York Indians* cases. The language of the Treaty required all Oneidas living east of the Mississippi River to remove to Kansas. Treaty, Arts. 1, 2, 13. PA 148-50, 155. Moreover, this Court has explained that the agreement by the Oneidas and others to abandon all eastern lands, rather than the exchange of Wisconsin and Kansas lands, was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Further, the judgment was not limited to lands in Wisconsin; the New York, Wisconsin and Canadian Oneidas all shared in a nearly $2 million recovery. *Id.* at 19; *United States v. New York Indians*, 173 U.S. at 468-69; *New York Indians v. U.S.*, 40 Ct. Cl. at 457-61; *In re Appeal of New York Indians*, 41 Ct. Cl. at 468-72.

2. The Second Circuit also incorrectly viewed Article 13 of the Treaty of Buffalo Creek – the Oneidas' agreement to remove "as soon as" they made satisfactory arrangements

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whether the Buffalo Creek prospectively terminated reservation status. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 492-93 (N.D.N.Y. 1990); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 539 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985).

with the governor of the State of New York to sell their remaining lands to the State – as a mere "agreement to agree," conditioned on subsequent land sales to New York State. *Sherrill*, 337 F.3d at 161.[12] On the contrary, this Court in *New York Indians* held that, by virtue of agreeing to remove, the Oneidas obtained an interest in the new lands for which the United States became obliged to pay years later, after it sold the land to non-Indian settlers. *See* 170 U.S. at 26, 36. The fact that Oneidas from New York shared in this award, *see New York Indians v. United States*, 40 Ct. Cl. 448, 467, 471-72 (1905), established that their removal agreement in Buffalo Creek was not simply an "agreement to agree." Indeed, in Article 13, the Oneidas agreed to remove "as soon as" they disposed of their lands, not "only if" they were able to sell them. PA 155. This Court has recently recognized that an agreement to remove "as soon as" an expected imminent event occurs is a present agreement to remove. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189-90 n.4 (1999).

3. The Second Circuit's heavy reliance on a purported statement to the Oneidas by the United States treaty commissioner that the treaty did not require them to remove, *Sherrill*, 337 F.3d at 161-62, is at odds with *New York Indians*. In *New York Indians*, this Court concluded that a treaty proviso adopted by the Senate requiring the explanation of its Buffalo Creek amendments to the New York tribes and each tribe's assent thereto and permitting the President to deduct from the new reservation 320 acres for each Indian who did not remove never became effective

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12 Indeed, elsewhere in its opinion, the Second Circuit recognized that the Oneidas had not merely agreed to agree to remove. 337 F.3d at 165 n.22 (acknowledging that *New York Indians* held that the Oneidas obtained nonforfeitable rights to the Kansas lands "merely by their agreement to remove").

because there was no evidence that the President ever approved the proviso. 170 U.S. at 22-23. The alleged statement cited by the Second Circuit is not annexed to the Treaty as reproduced in Statutes at Large and there is no evidence that it was ever approved by the Senate or the President. *See* 7 Stat. at 562-63 (no qualification of the Oneidas' agreement to remove); Supp. Art., 7 Stat. at 561, 564 (explicitly providing that the United States would not compel the St. Regis Indians to remove).

4. The Second Circuit improperly required the presence of specific cession language to make a finding of reservation disestablishment. 337 F.3d at 158-61. ("[t]here is no specific cession language, and no fixed sum payment for opened land in New York"). A reservation may be diminished despite the absence of specific cession language. *See Hagen v. Utah*, 510 U.S. 399, 403-04 (1994) (finding disestablishment where reservation land was "restored to the public domain" by statute, although the tribe refused to enter a treaty for cession of its land); *see also Solem v. Bartlett*, 465 U.S. 463, 471 (1984) ("explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977). On the contrary, what is required for reservation disestablishment is merely that the "'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 444 (1975) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). The express terms of the Treaty of Buffalo Creek, as well as the legislative history and surrounding circumstances, make clear that Congress intended to disestablish any Oneida reservation in New York.

First, Article 2 of the Treaty (PA 149-50) explicitly refers to the Indian Removal Act of 1830, 4 Stat. 411, the

purpose of which was to "[m]ake a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.). The Indian Removal Act's goal of avoiding conflicts of state and tribal sovereignty could be accomplished only if any Oneida sovereignty over the area from which they were obligated to remove was terminated.

Second, the legislative history of other congressional acts supports the view that Congress intended to disestablish the Oneidas' New York reservation. For example, the legislative history of 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) states that the "Oneida . . . Indians have no reservation" in New York State and "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949). Thus, consistent with the 1838 Treaty of Buffalo Creek and the decisions in the *New York Indians* cases, Congress (over one hundred years after the 1838 Treaty of Buffalo Creek was ratified) continued to express the view that the Oneidas' New York reservation was no more.

Third, as explained above, in *New York Indians*, this Court held that title to the Kansas lands passed to the Oneidas at the time the Treaty of Buffalo Creek was made. *New York Indians*, 170 U.S. at 34. Surely, Congress did not intend to pass title to land in Kansas to the Oneidas, while at the same time allowing a 300,000-acre reservation in New York to continue to exist.

Fourth, the circumstances surrounding the Properties mandate a finding that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation. Although the "most probative" evidence of diminishment (or disestablishment) is

statutory language, this Court also considers "the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998) (citing *Hagen v. Utah*, 510 U.S. 399 (1994)). The City of Sherrill is predominantly populated by non-Indians. In fact, the record below established that only .3% (three-tenths of one percent) of Sherrill's population is American Indian, Eskimo, or Aleut. Furthermore, New York State, and later the City of Sherrill, have exercised jurisdiction over this land from the time of the Properties' transfer from the Oneidas to non-Indians.

Finally, the Second Circuit's observation that the influx of non-Indian settlers into the area is the "least compelling" consideration in the allotment context (337 F.3d at 164) has no force in the context of a removal treaty such as Treaty of Buffalo Creek. Unlike allotment cases – where Indians were expected to remain on their allotted lands in the vicinity of lands that were opened to settlement by others – the premise of the Treaty of Buffalo Creek was that the Oneidas were to leave New York entirely and move to a reservation in Kansas.[13]

5. The Second Circuit's holding that the Treaty of Buffalo Creek did not terminate any Oneida reservation in New York also conflicts with this Court's holding in *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). In *Santa Fe*, the Walapai Indians requested that a new reservation be created for them because of the encroachment of settlers onto their lands. The President created the new reservation by executive order and the Walapais accepted it, although only a few actually moved there. Nevertheless, this Court held that the creation of the new reservation and the tribe's acceptance of it amounted to a relinquishment of tribal claims to lands outside the new reservation. *Santa Fe*, 314 U.S. at 357-58.[14]

This Court's decision in *New York Indians* establishes that the Oneidas accepted a new western reservation in the Treaty of Buffalo Creek. Although only a few Oneidas actually removed, the Oneidas received the benefit of their bargain: they were paid for the new reservation in *New York Indians*. *Santa Fe* establishes that the benefit came with a corresponding burden: the Oneidas' relinquished any alleged tribal jurisdiction over lands in New York.

Therefore, it is beyond legitimate dispute that the 1838 Treaty of Buffalo Creek disestablished any Oneida reservation in New York.

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13 A finding that the Oneida reservation was terminated is not precluded by the fact that a 32-acre parcel in the area is recognized as Oneida land today. If the Oneidas reconstituted as a tribe in New York, the federal government could recognize at that time a federal reservation for those New York Oneidas.

14 The decision below also conflicts with the holdings of the Seventh Circuit in *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 458-59 (7th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999) (hunting and fishing rights reserved in lands that the tribe ceded to the United States in an 1831 treaty were terminated by an 1848 treaty in which the tribe agreed to cede to the United States its remaining Wisconsin lands and remove to Minnesota, although the hunting and fishing rights were not mentioned in the 1848 treaty and the tribe never left Wisconsin); *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 223-24 (7th Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994)(hunting and other occupancy rights retained by the tribe in land ceded to the United States in an 1842 treaty were extinguished in an 1854 treaty ceding their lands to the United States in exchange for a promise of reservations and annual payments).

III. INDIAN COUNTRY STATUS CEASES WHEN A TRIBE NO LONGER EXISTS

A final reason why the judgment below must be reversed is that Indian country status ceases when a tribe no longer exists. Indian country includes reservations, dependent communities and allotments of Indian tribes. 18 U.S.C. § 1151. Once an Indian tribe no longer exists, Indian country status for the tribe's land ceases. To restore Indian country status if the tribe or a successor thereafter comes back into existence, an application must be made under the Indian Reorganization Act. The Second Circuit's holding to the contrary improperly expands the scope of Indian country.

The Indian Trade and Intercourse Act, 25 U.S.C. § 177, protects Indian country.[15] The Court of Appeals held that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. That is illogical, circular and incorrect. Rather, the Oneida Indian Nation has no rights under the Indian Trade and Intercourse Act, 25 U.S.C. § 177, and no claim to historical reservation status for the Properties, unless the Oneida Indian Nation has been in continuous tribal existence since the Properties became subject to the Act. *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*"); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (tribe may recover only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time the land was alienated until the time of suit); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 & n.7 (D. Mass. 1978), *aff'd*, 592 F.2d

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15 That is so whether the scope of the Indian Trade and Intercourse Act is limited to Indian country or is broader than Indian country.

575 (1st Cir. 1979).

The fact that Oneida Indian Nation is presently a federally recognized tribe is irrelevant to whether the land it currently owns is Indian country. "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Indian Trade and Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still turn to the district court for an ultimate judicial determination of its claim under the Indian Trade and Intercourse Act." *Id.* at 58.

The Second Circuit's logical fallacy is as follows: If there was a lapse in the Oneida Indian Nation's tribal status, Indian Trade and Intercourse Act coverage and Indian country status both terminate at the moment in time when that lapse begins. No other result is possible: How can land be Indian country if the tribe that previously owned or used it has ceased to exist? How can land be owned by an Indian tribe if the tribe has ceased to exist?

Once Indian country status ends, or once the protection of the Indian Trade and Intercourse Act ceases, the land is then freely alienable, subject to state and local taxation; purchase by the tribe does not create an exemption to taxation unless the lands are restored to trust protection under § 465 of the Indian Reorganization Act. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights.

- "Since original Indian title is dependent upon

proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe constitutes a defense to the aboriginal claim." Felix S. Cohen, *Federal Indian Law*, Ch. 9, Sec. A2a (1982 ed.).

• "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *United States v. Cook*, 86 U.S. 591, 593 (1873).

• "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917).

• "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated *or abandoned.*" *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994)(emphasis added).

• "Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979).

• "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932).

337 F.3d at 171-72.

The record below contained substantial evidence that the New York Oneidas ceased to exist for a substantial period of time:

• 1877: "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).

• 1891: "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to

distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* CA 1228-31.

• The 1892 Census Map of New York depicts no Oneida reservation. CA 990-95,1221.

• 1893: "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* CA 1228-31.

• 1900: "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior.* CA 1232-39.

• 1901: "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida

Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior.* CA 1232-39.

• 1906: "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have "squatted" on the Onondaga Reserve: so many of these have intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as "Oneidas at Oneida" which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Report of the Department of the Interior.* CA 1240-41.

The non-existence of the New York Oneidas as a tribe persisted into the mid-twentieth century. For example, the record below also showed that in 1925, an Assistant Commission of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. (CA 1250.) Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). (CA 1180-83.) Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

Accordingly, the Second Circuit misinterpreted the scope of the Indian Trade and Intercourse Act, and wrongly affirmed the grant of summary judgment for the Oneida Indian Nation. At the very least, that error should be corrected and the judgment reversed and the case remanded for discovery and trial.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

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